

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

**NATIONAL EXPRESS TRANSIT
CORPORATION**

Employer

Case 01-RC-243252

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 25**

Petitioner

DECISION AND DIRECTION OF ELECTION

National Express Transit Corporation (the Employer) provides paratransit services for disabled customers in Boston, Massachusetts and certain surrounding cities and towns. The Petitioner, International Brotherhood of Teamsters Local No. 25, has petitioned for a unit consisting of “[a]ll full-time and regular part-time Safety Supervisors at the Hyde Park location.”

The sole issue in this matter is whether the petitioned for employees are supervisors within the meaning of the National Labor Relations Act (the Act). For the reasons set forth below, I find that the Safety Supervisors are non-supervisory employees.

I. FACTS

A. Introduction

There are eight safety supervisors employed in the Safety Department, which is led by a safety and training manger, Melchiorre Conti. Tr. 18-19. The Safety Department also employs a claims administrator and a camera reviewer. Tr. 19. The Employer also employs drivers, site supervisors, and fuelers who are represented by the Petitioner. Tr. 16.

B. Training Newly Hired Drivers and the Certification Process

The safety supervisors conduct the training program for newly hired drivers. Tr. 17, 22. Safety supervisors teach the three-week orientation program, which includes eighty hours of classroom instruction and forty hours of training on the road. Tr. 17, 27-28, 79, 106. During the training, the safety supervisor observes the new hire and can make a recommendation whether the

new hire is able to perform the job. Tr. 28. With regard to the classroom instruction, Conti testified that the safety supervisors can make a recommendation if a newly hired does not meet the classroom requirements the Employer “can terminate the driver.” Tr. 28. There is no further evidence in the record to show what investigation, if any, is done when the Employer receives such a recommendation, nor is there any evidence of an instance in which this type of recommendation was made or acted upon.

When the three weeks of training are finished, a safety supervisor is assigned to provide a final test to the driver, which is referred to as a certification. Tr. 29, 79, 81. The safety supervisors complete a Final Driving Evaluation form when evaluating the newly hired driver at the end of the orientation program. Pet. Ex. 1; Tr. 21. The form is a pass or fail checklist that includes various driving skills. Tr. 22, 79, 81. There are boxes at the bottom of the form for the safety supervisor to check that he either recommends the student become a driver or mark that the student has not satisfactorily demonstrated that he has mastered the required standards. Pet. Ex. 1; Tr. 29. The record includes testimony of safety supervisors making judgment calls when completing the evaluation form and observing the drivers’ skills and ability to complete other tasks such as wheelchair securement. Tr. 29-30, 80. Conti testified that there is not a precise number of feet or times a driver might weave out of a lane before they fail a requirement on the form. Tr. 30. Likewise, a safety supervisor, Bob Daly, testified that there is not a certain number of times that a driver must fail to signal before they fail that requirement on the form. Tr. 81. Daly generally described the task of evaluating and observing the drivers as using his experience on the road. Tr. 86-89. Another safety supervisor, Walter Thomas, testified that a driver not signaling when there are no cars around is different than a driver failing to signal in traffic. Tr. 208. Thomas testified that he bases his evaluations on experience and follows the TAPTCO guidelines. Tr. 208-98.¹ Thomas also explained that he applies variables such as changing the four-second rule to five or six seconds if road conditions are poor. Tr. 210.

The record contains inconsistencies as to whether the safety supervisors’ submission that a driver has not met the required standards on the certification form always results in a termination. Conti testified that he has never overruled a recommendation of a safety supervisor. Tr. 31-32.² Daly testified that the recommendation on the evaluation form “has always been followed.” Tr. 81-82. The General Manager, Victor Herrera, testified the “majority of the time” the Employer followed the recommendation of a safety supervisor, however, there are instances in which he would confer with the human resources manager, Danielle Williams, and talk to the Safety Department to decide a driver should not be terminated. Tr. 18. Williams testified that there are “sometimes” situations in which the safety supervisors’ recommendations have been overruled. Tr. 154. For example, Williams testified that the Employer decided to have a second safety

¹ The record shows that safety supervisor receive training, including first aid courses and defensive driving courses. Pet. Ex. 4; Tr. 168.

² The safety supervisors also recommend that a new hire receive additional training, rather than recommend termination. Tr. 83-84. The record shows that the Employer has never disagreed with a recommendation from a safety supervisor for additional training, Tr. 85; however, the record provides no specific instances when this occurred or the process that was followed.

supervisor review a newly hired driver before terminating him and that the safety supervisors “usually” have more than one person look before terminating a driver. Tr. 155. Williams then testified that the trainee might object to the recommendation and then the trainee gets another chance with a different safety supervisor. Tr. 163. Thomas also confirmed that there are times when Conti sends a second safety supervisor to review a driver. Tr. 179-80.

The Employer provided nine instances in which a newly hired driver was terminated³ for failing the certification process:

1. The Employer terminated Max Napoleon for failing the certification process. Er. Ex. 11. There is a Final Driving Evaluation form signed by a safety supervisor that states he does not recommend him to be a driver for the company. Er. Ex. 11. When Employer’s Counsel asked Williams to her “knowledge, was [the recommendation of the safety supervisor] just automatically accepted,” Williams responded that “[i]t was.” Tr. 141.
2. The Employer terminated Henry Neree after failing passenger assistance training. Er. Ex. 12; Tr. 141. When Employer’s Counsel asked Williams whether “the only thing you had is [the safety supervisor’s] recommendation, and based on that the person was terminated,” Williams responded “[y]es.” Tr. 142.
3. The Employer terminated Prosol Guerrier after ten days based on the recommendation of an unidentified Safety Supervisor. Er. Ex. 13; Tr. 145.
4. The Employer terminated Carl Phanor after eight days for not passing a training course. Er. Ex. 14. Williams testified that the Employer terminated the driver based on a safety supervisor’s recommendation. Tr. 146.
5. The Employer terminated Wilson Dubusson after he failed the certification process. Er. Ex. 15; Tr. 147-48. Williams testified that the driver was terminated based on the paperwork from the safety supervisor stating that the driver did not pass the test. Tr. 148.
6. The Employer terminated Antoine Smaralda after he failed the certification process. Er. Ex. 16. Williams testified that she could not remember the safety supervisor who was involved but that he “would have” submitted certification paperwork. Tr. 150.
7. The Employer terminated Jean Sanon after he failed the certification process. Er. Ex. 17; Er. Ex. 20. Williams testified that the decision to terminate the driver was based on the recommendation of the safety supervisor and driver trainer. Tr. 151. Thomas testified that he recommended Sanon not be certified after speaking with the driver trainer. Tr. 202.
8. The Employer terminated Pierre Bazalais after failing the certification process. Er. Ex. 18. Williams testified that it was based on a recommendation by a safety supervisor. Er. Ex. 18; Tr. 152.
9. The Employer terminated Jean Pierre Noel after failing the certification process. Er. Ex. 19. The safety supervisor, Thomas, drafted a report detailing the issues with Noel. Er. Ex.

³ There is a collective-bargaining agreement for drivers, however, it appears not to apply to the newly hired drivers’ terminations. Article 6, Section 1 provides that new employees are hired on a trial basis and may be dismissed without protest by the Union. Pet. Ex. 2; Tr. 63.

19. The narrative does not include any recommendation for the outcome of his employment. Er. Ex. 19.⁴

C. DriveCam Violations

The record shows that safety supervisors coach drivers for DriveCam violations. Tr. 27, 32. DriveCam is a camera recording device in every vehicle that is activated when there is a triggering event, such as sudden and hard braking or taking a turn too sharp. Tr. 27, 32, 51. When the DriveCam is activated, the event is captured by the camera and the footage is sent electronically from Lytx, the third-party vendor, to the Employer. Tr. 32, 51. Lytx sends a Coaching Session Report form along with the footage that includes a comment from Lytx describing the incident. Ex. 2-8; Tr. 182. The Employer documents instances where safety supervisors provide coaching to a driver after a DriveCam violation on the same forms. Er. Ex. 2-8; Tr. 36-48. The safety supervisor often includes a description of the coaching that he provided at the top of the same forms. Er. Ex. 2-8; Tr. 182.

The record reveals not every triggering event results in a coaching. The record does not establish whether all safety supervisors regularly review the DriveCam footage for the purpose of determining whether coaching is necessary. Conti initially testified that safety supervisors review the video footage and determine whether coaching is necessary or whether there is an FYI. Tr. 34. Conti initially maintained that a safety supervisor could review video footage and decide no coaching was necessary. Tr. 32, 42, 60. Conti later testified that he reviews the DriveCam footage when it is received from Lytx. Tr. 219. Conti testified that Safety Supervisor, James Hardiman, reviews footage on the weekend when Conti is not present and a newly hired Safety Supervisor, August Guerton, will begin to review footage on the weekend as well. Tr. 219. Safety Supervisor, Walter Thomas, testified on multiple occasions that Conti reviewed the DriveCam footage initially to determine if there is a coachable infraction before assigning the incident to a safety supervisor for coaching. Tr. 183, 199, 215. At one point, Thomas testified that safety supervisors do review DriveCam footage to determine whether it is a coachable offense or not, only to then explain that Conti would have already reviewed the footage, so the safety supervisors are only reviewing the footage to facilitate the coaching. Tr. 200-01.

The record also does not reveal whether every triggering event that does not result in a coaching is labeled an FYI and shared with the driver, or if some events are not even treated as FYIs. Tr. 34. Similarly, it is not clear whether Lytx is the only entity that categorizes events as FYI or whether the Employer also determines an event warrants an FYI. Conti testified that he reviews DriveCam footage and can contact Lytx if he believes that there is no violation for an incident. Tr. 52. Conti explained that each event sent by Lytx is reviewable if Conti or a safety supervisor feels that the footage shows it is not the driver's fault. Tr. 53. There is some evidence to indicate that safety supervisors have ability to question that an event not categorized as an FYI

⁴ This is the only such narrative in the record, and it is not clear whether these narratives are regularly submitted as part of the certification process when a driver is terminated.

is not a truly coachable event and request that Lytx should review it for a second time so that Lytx reviews its own initial decision. Tr. 65.

The Employer has Lytx provide an online training for the safety supervisors to understand what to look for in the video footage. Tr. 50. There is some judgment in determining what is a violation, however, the safety supervisors must provide coaching for a violation. Tr. 36. There is no checklist for the safety supervisors to follow when reviewing the footage and issuing the coaching. Tr. 36.

A company policy entitled “Progressive Disciplinary Action” outlines the policy for discipline that relates to the DriveCam violations. Er. Ex. 1.⁵ On the third coaching event within a thirty-day cycle, a verbal warning is issued. Er. Ex. 1. On subsequent coaching events, there is a first written warning, second written warning, final written warning, and then a termination. Er. Ex. 1. There is no evidence in the record to show that the Employer has ever issued a warning after three violations relating to the DriveCam.

D. Spot Checks

The safety supervisors also conduct day-to-day supervision—called spot checks—on drivers that often results in coaching for drivers. Tr. 94-95, 198. The safety supervisors select the driver for a spot check on their own, regularly making the selection based on a driver that is geographically close to their location. Tr. 94, 198. They observe whether the driver is acting appropriately, check whether the driver escorts the passenger from the vehicle, inspect the vehicle and safety equipment, and check for valid registration and license. Tr. 95.

The safety supervisors’ spot checks generally do not result in further discipline beyond coaching, however, they sometimes result in a “write up.” Although the record is not entirely clear, it appears when safety supervisors testify about “writing up” a driver, they are referring to a report that is submitted to the safety manager, rather than issuing a written warning to the driver. Daly testified that he recently observed a driver on a spot check violating the door-to-door policy and chose to coach him instead of writing up a report for a violation. Tr. 92. When pressed to provide an example where a spot check resulted in discipline, Daly testified that it was about five years ago that he “wrote up” a driver for violating the door-to-door policy, and the Employer issued that driver a one-day suspension for the incident. Tr. 98. Daly testified that he decides whether to coach a driver or write them up for blocking crosswalks, however, he did not provide a specific instance in which he wrote up a driver for such conduct. Tr. 100-01. Daly testified that when safety supervisors write up a driver, the report is brought to the safety manager and “they’re the ones who follow through on that; whether they’re going to be disciplined or not.” Tr. 99. Later, Daly testified that his “job is to coach, and then report.” Tr. 109. Daly continued to explain that

⁵ The Employer and Union are parties to a collective-bargaining agreement for drivers. Pet. Ex. 2. Article 10, Section 4 provides that the Employer recognizes the concept of progressive discipline, however, it applies the concept on a case-by-case basis. Pet. Ex. 2. Coaching is not listed in the steps for progressive discipline. Pet. Ex. 2.

when he feels discipline is warranted, he goes to the safety manger and “then [Conti] takes it from there.” Tr. 110. When questioned again, Daly explained that he writes up a report and the safety manager decides what to do and whether to issue a warning. Tr. 120. Daly admitted that his recommendations for discipline have been overruled “at times” if you go a “few years back.” Tr. 120. Similarly, Thomas testified that he coaches drivers when conducting spot checks and writes up an incident report with the facts that he submits to Conti for repeat offenses. Tr. 212-14, 167-68.

E. Other Responsibilities

The safety supervisors are responsible for gathering information after an accident involving a driver and completing accident reports. Tr. 170. The safety supervisors gather information, take photographs, and obtain information from other involved parties. Pet. Ex. 5, 6(a), 6(b); Tr. 170. The safety supervisors do not assess fault when investigating an accident. Tr. 211.

The record shows evidence that safety supervisors have also completed annual evaluations for drivers. Pet. Ex. 3; Tr. 112. The safety supervisors provide a numerical score from one to three for various categories. Tr. 121-23. The record contains no evidence that the evaluations lead directly to personnel actions or otherwise affect the job status of drivers.

The record shows that safety supervisors sign disciplinary reports issued to drivers for speeding. Er. Ex. 9; Tr. 74. The “Progressive Disciplinary Action” policy also outlines a progressive system for discipline relating to speeding violations. Er. Ex. 1. The record shows that the Employer issued four warnings to separate employees for speeding violations. Er. Ex. 9; Tr. 73. The Employer uses Zonar, an electronic device that automatically notifies the Employer if a driver exceeds the speed limit by more than fifteen miles per hour for thirty seconds. Tr. 76. The safety supervisors must issue the warnings to employees upon receipt of a Zonar report.

II. ANALYSIS

Section 2(11) of the Act defines a supervisor as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all the powers specified in Section 2(11) of the Act because possession of any one of them is sufficient to confer supervisory status. *See Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001). The Board refrains from construing supervisory status too broadly because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *See Quadrex Envtl. Co.*, 308 NLRB 101, 102 (1992). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999).

In *Oakwood Healthcare, Inc.*, the Board held that to establish that an individual possesses supervisory authority with respect to any of the statutory functions, the individual must also exercise independent judgment in exercising that authority, which depends on the degree of discretion with which the function is exercised. 348 NLRB 686, 693 (2006). “[T]o exercise independent judgment, an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* The Board explained that a “judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* The Board also stated that the degree of discretion exercised must rise above the “routine or clerical.” *Id.*

A. The Safety Supervisors Do Not Have the Authority to Effectively Recommend Discharge of Newly Hired Drivers

The role of the safety supervisors in evaluating newly hired drivers and performing the certification process for those drivers is not evidence of supervisory status. The authority to evaluate is not one of the Section 2(11) indicia supervisory status. *See Elmhurst Extended Care Facilities*, 329 NLRB at 536-37. When an evaluation does not by itself affect the wages or job status of the employees being evaluated, the individual preparing such an evaluation will not be found to be a statutory supervisor based on the evaluation. *See Franklin Hosp. Med. Ctr.*, 337 NLRB 826, 831 (2002); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1334 (2000). Here, the Employer contends that the safety supervisors have the authority to recommend that newly hired drivers be discharged by the fact that they determine whether to recommend a new driver on the evaluation form that is submitted to the Employer.

The Board recently held that a disputed individual did not possess the authority to hire or effectively recommend hiring when he conducted driver tests and reported results to management. *See UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 4 (July 27, 2017). Over the years, the Board has consistently applied the same principle in *UPS Ground Freight* to find that an assessment of an applicant’s technical ability to perform the required work and a reporting of that assessment does not constitute an effective recommendation to hire. *See Pac. Beach Corp.*, 344 NLRB 1160, 1161-62 (2000) (finding employee who conducted driving tests and reported results was not a supervisor where a higher level supervisor made the final hiring decision); *see also GRB Entm’t Inc.*, 331 NLRB 320, 321 (2000) (explaining that the role in the process was limited to testing skills and reporting results, rather than recommending a candidate be hired or rejected); *Hogan Mfg., Inc.*, 305 NLRB 806, 807 (1991) (holding that is it the test result and not the independent recommendation of the disputed individual that the company used in deciding to hire the applicant).⁶ The fact that higher managers accept and rely on an individual’s technical

⁶ These cases are distinguishable from a situation in which the employer delegates to the disputed supervisor the responsibility to assess the candidates’ qualifications along with the responsibility to make the final selection whether the applicants should be hired. *See RB Assocs.*, 324 NLRB 874, 879 (1997). Thus, the Board only confers supervisory status on this basis when the disputed

assessment of employees' or applicants' skills represents deference to their technical expertise rather than a delegation of statutory supervisory authority. *See Elmhurst Extended Care Facilities*, 329 NLRB at 536 (holding that charge nurses' evaluations of probationary employees does not constitute an effective recommendation for their retention, where they do so in a manner like that of more experienced employees who conduct tests and grade the skills of new hires against recognized standards or guidelines).

Like the other Board decisions concerning tests for candidates seeking hire, the Employer has failed to establish that a safety supervisor's role in completing the evaluation form during the certification process constitutes an effective recommendation for any employment action, including discharge. Initially, the test results on the evaluation form is comparable to the test results in the prior cases that the Board found do not constitute final recommendations. Moreover, the Employer only offered two instances in which it claimed the Employer relied solely on the safety supervisors' recommendations to terminate drivers: Napoleon and Neree. Those two examples are based on conclusory statements in response to leading questions. For the remaining seven instances where a new driver was terminated for failing the certification process, the Employer provided no evidence to indicate whether the evaluation form was the only thing it relied on or whether it considered other factors in deciding to terminate the drivers. Instead, Williams merely testified that the decision was "based" on the certification results, without any context as to the process and whether there was additional investigation or consideration. Such generalized testimony is insufficient because the party asserting supervisory status must "present detailed, specific evidence and cannot rely on conclusory testimony or evidence that is inconclusive or otherwise in conflict." *G4S Regulated Sec. Solutions*, 362 NLRB 1072, 1073-74 (2015) (faulting an employer for relying on testimony that mostly consisted of conclusory responses to leading questions, not describing what procedures or other factors govern disciplinary actions, and not providing testimony about specific instances).

Moreover, three witnesses—Herrera, Williams, and Thomas—admitted that there have been occasions where the Employer does not follow the recommendation of the safety supervisor on the evaluation form. Williams and Thomas both testified further that there have been occasions where the Employer decided to have another safety supervisor conduct a certification after receiving results from one safety supervisor that did not recommend the new driver. *See Hogan Mfg.*, 305 NLRB at 807 (relying on the fact that the disputed individual does not make a recommendation for or against hire, but rather requests a second opinion when "the call is close"). The record is also insufficient to show that independent judgment is used when completing the certification process because the evaluations forms are completed in accordance with their technical expertise based on years of road experience, training, and regulations. Thus, the Employer has not established that safety supervisors effectively recommend discharge when completing the certification process.

supervisor completes the assessment and makes the final decision on the hiring or discharge of the individual taking the test.

B. The Safety Supervisors Do Not Have the Authority to Issue or Effectively Recommend Discipline

The role of the safety supervisors in issuing coaching notes to drivers for DriveCam violations or for spot check violations does not establish their supervisory status. The “mere authority to issue verbal reprimands . . . is too minor a disciplinary function to constitute statutory authority.” *Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989). Furthermore, the Board has held that verbal warnings and reprimands that do not affect employees’ job status do not constitute supervisory authority. *See id.* The Employer contends that the act of coaching should constitute discipline because it is part of an established progressive disciplinary policy, however, that misstates that facts in this case and the applicable law. The parties’ collective-bargaining agreement does “recognize the concept” of progressive discipline, however, it does not include coachings as part of that progression and it states that steps will be applied on a case-by-case basis. Pet. Ex. 1. Thus, the collective-bargaining agreement does not establish any set policy in which coachings lay the foundation for subsequent discipline. *See Ohio Masonic Home*, 295 NLRB at 394 (explaining that the employer’s policy provides that disciplinary action will be administered on the merits of each case and the department director independently determines when more discipline is necessary after reviewing the disputed employees’ reports). Although the Employer does have a separate progressive discipline policy specifically for DriveCam violations, it requires three incidents of coaching in a thirty-day period before it issues a verbal warning. Er. Ex. 1. There is no evidence to show that the Employer has even issued more than one coaching for a DriveCam violation to the same employee, let alone three coachings within a month. Thus, there is no record evidence that the Employer has ever relied on a coaching by a safety supervisor for subsequent discipline to a driver nor is there evidence that any coaching event has otherwise affected the employees’ job status in any manner.

Regardless of whether the Employer recognizes any concept of progressive discipline or has a policy that hypothetically provides a chance that an employee might be subject to further discipline as a result of multiple coachings within a set period for DriveCam violations, the fact that an employer maintains a progressive disciplinary policy is not enough in itself to find verbal warnings constitute discipline. *See Ken-Crest Servs.*, 335 NLRB 777, 778 (2001) (explaining that the employer failed to demonstrate that any actual consequences flow from the documented verbal warnings even though the company had a progressive disciplinary system). Here, there is no evidence of specific instances in which a safety supervisor recommended further discipline and the Employer imposed the discipline without any investigation. When pressed by Employer’s Counsel, Daly was still unable to provide any recent examples in which a spot check resulted in further discipline. The only example he provided—a suspension from five years ago—included no evidence whether the Employer investigated before issuing the suspension or what, if any, recommendation Daly made in his report.⁷ Given that the Employer has the burden of proof on

⁷ For these reasons, the facts here are distinguishable from decisions in which the Board conferred supervisory status based on evidence of specific instances in which individuals made explicit recommendations for discipline and upper management acted on those recommendations without conducting an independent investigation. *See Berthold Nursing Care Ctr., Inc.*, 351 NLRB 27,

the issue, the Employer is obligated to provide evidence that it conducted no independent investigation before issuing the suspension and that the safety supervisor had made a suspension recommendation that it simply followed. The Employer did not provide evidence of any coaching report that recommended further discipline, or that safety supervisors have discretion to determine what corrective action should be taken if a driver receives multiple coaching sessions, or that any action is taken solely based on coaching reports without further inquiries. *See Passavant Health Ctr.*, 284 NLRB 887, 889 (1987). It is not enough to show that a warning or reprimand initiate, or be considered in, future discipline as part of a progressive discipline policy because it must be the basis for the later action without independent review by other supervisors. *See id.* at 890; *see also Vencor Hosp.*, 328 NLRB 1136, 1139 (1999) (holding that there was “no evidence as to what role these reports play in any discipline that many be imposed”).

Furthermore, the Employer further failed to show that the safety supervisors act with the necessary degree of independent judgment when providing coaching to drivers. With specific regard to coaching for DriveCam violations, the record appears to show that the Safety Manager, Conti, handles the initial review of most incidents that the Employer receives from the third-party vendor, Lytx. After Conti’s review, he assigns the incidents to safety supervisors for coaching when necessary. One safety supervisor reviews incidents on the weekends, however, there is no evidence that the remaining safety supervisors play such a role. Other safety supervisors do not complete the initial review of the incidents to determine if coaching is necessary.⁸ All the safety supervisors do review the footage when providing coaching, however, even then Lytx sends a report with the video footage that includes a description of the violation in a comment section. The reports—and the entire record—fail to show any instance in which the safety supervisor provided different coaching than reported by Lytx based on a comparison of the comment sections completed by Lytx and the safety supervisors. With regard to both the spot checks and DriveCam violations, the record shows that the safety supervisors follow their training, company policies, and driving regulations to determine whether the drivers have committed any violations.

29-30 (2007). Likewise, the *Progressive Transportation* decision is different because the evidence in that case showed that the disputed individuals’ recommendations did result in discipline without any independent investigation. *See* 340 NLRB 1044, 1046 (2003). The record in that case also included all disciplinary notices that showed the warnings did affect job status because they were referenced in later discipline imposed against the same employees. *See id.* (explaining further that all the notices and subsequent discipline were signed by the disputed individuals).

⁸ The fact that one specific safety supervisor reviews footage for some unknown duration on a single day of his work week is insufficient evidence to conclude that he is a statutory supervisor. The Employer did not prove that this task for the specific safety supervisor is more than an isolated responsibility because it did not provide any evidence regarding how much time is spent on that single work day reviewing footage. There is also insufficient evidence to show there is any independent judgment used when reviewing the footage. For example, the record does not include any specific instance in which the safety supervisor reviewed the footage and determined coaching was not necessary, rather than simply passing it along to a fellow safety supervisor for coaching in accordance with the description provided by Lytx. Moreover, it certainly does not support a conclusion that the remaining safety supervisors are statutory supervisors.

With regard to spot check violations, the record includes some evidence to show that the spot checks have resulted in more serious discipline than coaching. However, the record does not show that these disciplines are the result of an effective recommendation from a safety supervisor. Instead, it appears that safety supervisors submit their findings or reports to the safety manager for a determination what, if any, discipline is warranted. Although the safety supervisors testified about “write ups,” the entire record shows that the safety supervisors were referring to factual reports they submitted to the safety manager, and not written warnings. The Employer failed to offer any example of a write up submitted by a safety supervisor. As a result, there is nothing in the record establishing that the write ups include any recommendation for discipline, rather than a factual account as described by the safety supervisors. Tr. 109, 167-68, 212-14. The Employer bears the burden to submit evidence showing such writes up include a recommendation, particularly when the safety supervisors testify to the contrary. Moreover, the Board requires evidence showing that the recommendations result in discipline without independent investigation to conclude it is an effective recommendation. *See Passavant Health Ctr.*, 284 NLRB at 890. Here, both safety supervisors testified that the safety manager decides whether to issue discipline and they only submit the report.⁹ Tr. 92, 98-101, 109, 167-68, 212-14. Daly admitted that he writes up a report for a driver and submits it to Conti who follows up and decides whether to discipline the driver. Tr. 99, 110, 120. The Board has held “[w]here oral and written warnings simply bring to an employer’s attention substandard performance by employees without recommendations for future discipline, the role of those delivering the warnings is nothing more than a reporting function, which is not supervisory authority.” *Williamette Indus., Inc.*, 336 NLRB 743, 744 (2001) (holding that the individuals report employee infractions to management, which makes the decision whether to discipline the employees). Thus, the Employer has not established that safety supervisors effectively recommend discipline when conducting spot checks on drivers, or that they have anything more than a reportorial role when performing spot checks.

C. The Safety Supervisors’ Other Responsibilities Do Not Confer Supervisory Status

The safety supervisors’ involvement in the issuance of warnings for speeding violations does not establish supervisory status because it does not require the use of independent judgment. Instead, the Employer issues warnings when a speeding device reports a driver for exceeding a certain amount of the speed limit for a certain period. Er. Ex. 9; Tr. 73-77.

The safety supervisors’ involvement in the investigation of accidents does not establish supervisory status because there is no evidence that the safety supervisors even make any

⁹ For example, Daly testified that he “wrote up” a driver about five years ago for a violation of the door-to-door policy, and the Employer suspended the driver. Tr. 98. The complete testimony indicates that the write up was the report submitted to the Employer and the suspension was the discipline the Employer issued. It would not make sense to conclude that Daly meant he issued a written warning and then the Employer issued a one-day suspension for the same incident.

recommendations for discipline as part of their involvement in these investigations. Pet. Ex. 5, 6(a), 6(b); Tr. 170, 211.

The safety supervisors' involvement in the annual evaluation of drivers does not establish supervisory status because there is no evidence to show that such evaluations affect the wages or job status of employees. Pet. Ex. 3; Tr. 112, 121-23. See *Elmhurst Extended Care*, 329 NLRB at 536.

III. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁰

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I shall direct an election in the following voting group for this purpose: All full-time and regular part-time Safety Supervisors employed by the Employer out of its Hyde Park, Massachusetts location, excluding all other employees, guards and supervisors as defined in the Act. If a majority of the valid ballots in the election are cast for the Union, the employees will be deemed to have indicated their desire to be represented by the Union, and it may bargain for those employees. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented, and I will issue a certification of results of election to that effect.

¹⁰ The Employer, National Express Transit Corporation, is a Delaware corporation with an office and principal place of business located at 180 Meadow Road, Hyde Park, Massachusetts from which it provides paratransit services. During the past year, a representative period, the Employer provided services valued in excess of \$50,000 to customers located within the Commonwealth of Massachusetts, who purchased, goods valued in excess of \$50,000 from points directly outside the Commonwealth of Massachusetts. Annually, the Employer provides services valued in excess of \$50,000 to a transit system, the Massachusetts Bay Transportation Authority.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 25.

A. Election Details

The election will be held on Wednesday, July 24, 2019 from 1:00PM-3:00PM in the conference room at the Employer's Boston, MA facility.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending July 13, 2019, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by July 19, 2019. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a

file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not

precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: July 17, 2019

/s/ Paul J. Murphy

PAUL J. MURPHY
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
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